

1 **WO**

2
3
4
5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Jennifer Marie Jones,) No. CV-12-2629-PHX-LOA
10)
11 Plaintiff,) **ORDER**
12 vs.)
13 Town of Quartzsite; Jeffrey Gilbert and)
14 Sondra Gilbert, husband and wife; Officer)
15 Rick Paterson; Officer Xavier Frausto; and)
16 Terry Frausto, husband and wife; and)
Denise Ann Florian, an adult female,)
Defendants.)

17 On January 14, 2014, Defendants filed a Motion for Judgment On The Pleadings
18 pursuant to Federal Rule of Civil Procedure (“Fed.R.Civ.P.”) 12(c). (Doc. 45) Defendants
19 move for judgment on the pleadings, alleging 1) the Complaint fails to allege sufficient facts
20 to plausibly support federal claims under the First and Fourth Amendments; 2) the Complaint
21 fails to state a state claim of intentional infliction of emotional distress and is time-barred by
22 the one-year statute of limitations; 3) the Complaint fails to state a state a § 1983 claim
23 against Defendant Denise Ann Florian because it fails to allege facts that she acted under
24 color of law; and 4) Defendants Gilbert, Paterson, and Frausto are entitled to qualified
25 immunity. (*Id.* at 1-2)

26 **I. Certificate of Conferral**

27 Defendants’ motion fails to comply with the Court’s May 17, 2013 Order, which
28 requires a verified certification of conferral prior to filing a Rule 12(b)(6) or Rule 12(c),

1 Fed.R.Civ.P., indicating that Defendants' counsel has conferred, or attempted to confer, with
 2 Plaintiff's counsel to determine whether an agreement to amend the Complaint would cure
 3 any pleading deficiencies, but they have been unable to so agree. (Doc. 23 at 2-3) This
 4 certification is required as a condition to filing a Rule 12(b)(6) and 12(c) motion for two
 5 reasons. Rule 15(a)(2), Fed.R.Civ.P., mandates that leave to amend should be "freely
 6 give[n]" when justice so requires and "[t]he Ninth Circuit has instructed district courts to
 7 grant leave to amend, *sua sponte*, when dismissing a case for failure to state a claim, 'unless
 8 the court determines that the pleading could not possibly be cured by the allegations of other
 9 facts.'" *Schrock v. Federal Nat. Mortg. Ass'n*, 2011 WL 3348227, at *9 (D. Ariz. Aug. 3,
 10 2011) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United*
 11 *States*, 58 F.3d 494, 497 (9th Cir. 1995)). There is a "longstanding rule that '[l]eave to amend
 12 should be granted if it appears at all possible that the plaintiff can correct the defect.'" *Id.* at
 13 1129 (quoting *Balistreri v. Pac. Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990)). This is
 14 especially true if the deficient pleading was filed by a *pro se* litigant as in this case. *See*
 15 *Marinov v. Federal Nat. Mortg. Ass'n*, 2012 WL 136003, at *3 (D. Ariz. Jan. 18, 2012).

16 In the District Court of Arizona, several Phoenix judges include a certification-of-
 17 conferral order as a standard order early in the litigation requiring the parties to confer prior
 18 to the filing of a motion to dismiss to determine whether such a motion can be avoided. *See*
 19 *Monje v. Spin Master Inc.*, 2013 WL 2390625, at *11 (D. Ariz. May 30, 2013). Motions to
 20 dismiss that do not contain the required certification are subject to be stricken on the Court's
 21 own motion. *See, e.g., Spiker v. Sanjivan PLLC*, 2013 WL 5200209, at *2 (D. Ariz. Sept. 16,
 22 2013).

23 **II. Federal Rule of Civil Procedure 12(c)**

24 "Judgment on the pleadings is properly granted when there is no issue of material
 25 fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v.*
 26 *Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citation omitted). A Rule 12(c) motion is
 27 properly filed "[a]fter the pleadings are closed - but early enough not to delay trial--a party
 28 may move for judgment on the pleadings." Fed.R.Civ.P. 12(c)). A district court has

1 discretion to deny a Rule 12(c) motion after excessive delay. *See Argo v. Woods*, 399
2 Fed.Appx. 1 (5th Cir. 2010) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal*
3 *Practice and Procedure* § 1367, at 514 (1990) (“Ordinarily, a motion for judgment on the
4 pleadings should be made promptly after the close of the pleadings. . . .”); *Grajales v. Puerto*
5 *Rico Ports Authority*, 682 F.3d 40, 46 (1st Cir. 2012) (district courts enjoy broad discretion,
6 but court should hesitate to entertain Rule 12(c) motion once parties have invested substantial
7 resources in discovery).

8 For purposes of a motion under Rule 12(c), a district court must accept a complaint’s
9 well-pleaded allegations as true, and construe the complaint in the light most favorable to the
10 nonmoving party, but will not accept unsupported conclusory statements. *DiCarlo v. St.*
11 *Mary Hospital*, 530 F.3d 255, 262-63 (3d Cir. 2008) (citation omitted); *Barany-Snyder v.*
12 *Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).¹ A motion for judgment on the pleadings is
13 generally evaluated under the same legal standard as a motion to dismiss pursuant to Rule
14 12(b)(6). *Lopez Reyes v. Kenosian & Miele, LLP*, 525 F.Supp.2d 1158, 1160 (N.D. Cal.
15 2007). A motion to dismiss under Rule 12(b)(6) is proper when a complaint is based on the
16 lack of a cognizable legal theory or there are insufficient facts alleged under a cognizable
17 legal theory. *See Balistreri*, 901 F.2d at 699. Although materials outside of the pleadings
18 should not be considered, a district court may consider all materials properly submitted as
19 part of the complaint, such as exhibits. *See Hal Roach Studios*, 896 F.2d at 1555 n. 19. If
20 “matters outside the pleadings are presented to and not excluded by the court,” a Rule 12(c)
21 motion must be treated as a summary judgment motion. Fed.R.Civ.P. 12(d).

22 **III. Discussion**

23 The Court’s September 4, 2013 case management order set a November 1, 2013
24 deadline for amending pleadings in this case. (Doc. 40 at 6) It is troubling that Defendants

25
26 ¹ The Court opines that the standard enunciated in *Hal Roach Studios v. Richard*
27 *Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) is outdated because it preceded the
28 Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and
Ashcroft v. Iqbal, 556 U.S. 662 (2009). *Twombly* abrogated *Conley v. Gibson*, 355 U.S. 41
(1957).

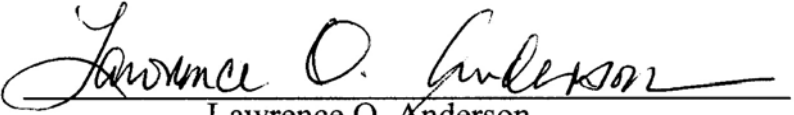
1 waited to file their motion until January 14, 2014, which is over eight months after
2 Defendants filed their Answer and two months after the pleading amendment deadline,
3 especially considering the Court raised the issue *sua sponte* whether Plaintiff's *pro se*
4 Complaint alleged sufficient facts to state claims at the September 3, 2013 case management
5 conference. (Doc. 40 at 4-5) The excessive delay and timing of the motion suggests
6 Defendants strategically waited to file the motion until after the amendment deadline to make
7 it more difficult for Plaintiff to cure any factual pleading deficiencies by amendment.

8 Because Defendants' motion does not contain a certificate of conferral and was not
9 promptly filed, and Defendants excessively delayed filing the motion until after the
10 amendment deadline had passed, the motion will be denied without prejudice.

11 Based on the foregoing,

12 **IT IS ORDERED** that Defendants' Motion for Judgment on the Pleadings, doc. 45,
13 is **DENIED** without prejudice. Defendants may re-raise the issues in a summary judgment
14 motion pursuant to Rule 56, Fed.R.Civ.P., at anytime before the July 18, 2014 dispositive
15 deadline.

16 DATED this 24th day of February, 2014.

17
18 
19 Lawrence O. Anderson
20 United States Magistrate Judge
21
22
23
24
25
26
27
28